IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1063 114

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,
Petitioner and Appellant below,

versus

MRS. EUGENE ADLER,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

And

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JUSTIN C. DASPIT,
Member of the Bar of the Supreme Court of the United States,
Louisiana National Bank Building,
Baton Rouge, Louisiana,
Counsel for Petitioner.

Of Counsel:

J. ELTON HUCKABAY,
SARGENT PITCHER, JR.,
H. ALVA BRUMFIELD, JR.,
A. LEON HEBERT, JR.,
Louisiana National Bank Building,
Baton Rouge, Louisiana.

SUBJECT INDEX.

	Page
Petition.	
Summary Statement of Matter Involved	1
Basis of This Court's Jurisdiction	2
Questions Presented	3
Reasons Relied on for Allowance of Writ	4
Brief.	
The Opinions of the Courts Below	7, 8
Jurisdiction	9
Statement of the Case	10
Specification of Errors	12
Argument.	
Undisputed Facts	14
Summary of Argument	15
A Disputed Point	20
Irreconcilable	22
Bill of Complaint	23
Cases Relied on by Plaintiff	23
The Law Point	26
Charter of City of Baton Rouge	26
Two in Six Hundred and Seventy-one Thousand	30
Bone of Contention	31
Louisiana Law	32
Abundance of Authority	36
The General Rule	36
No Nuisance	38
The Leading Case	42

Cases and Authorities Cited.

	Page
Benton v. City of St. Louis, 118 S. W., 418	40
Betz v. Limingi, 46 La. Ann. 1113, 15 So. 385	13, 19, 32 33-34, 35
Calloway v. Newman Mercantile Co., 321 Mo. 766, 12 S. W. (2d) 491	39
Champaign v. McInnis, 26 Ill. App. 338	42
City of Denver v. Hickey, 47 Pa. 908	40
City of Flora v. Naney, 31 Ill. A. 493, 26 N. E. 645	41
City of Plattsmouth v. Mitchell, 29 N. W. 593	41
Degeneres v. Pan American Petroleum Corporation, 153 So. 481	23, 24, 32
Erie R. Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188	36
Fuller v. Jackson, 82 Mich. 480, 46 N. W. 721	42
Graham v. Albert Lea, 48 Minn. 201, 50 N. W. 1108	38
Henrichs v. New Orleans Public Service, Inc., et al., 192 So. 383	13, 19, 34
Indemnity Insurance Company of North America v. Hinkle, 127 Fed. 2d. 655	23, 24, 25
Judice v. Village of Scott, 168 La. 111, 121 So. 592	13, 28
McGurk v. City of Shreveport, 191 So. 553	13, 18 28-30
McKnight, et al., v. City of Seattle, 81 Pac. 998, 39 Wash. 516	37, 42
Rochester v. Campbell, 123 N. Y. 405, 20 Am. St. Rep. 760, 25 N. E. 937	42-43
Varnado v. City of Baton Rouge, et al., 5 La. App. 238	13, 18

Act 169, La. Legis. of 1898	13, 26, 45
Act 224, La. Legis. of 1938	19, 26 33, 45
La. Civil Code, Articles 450, 454, 458	28
13 R. C. L., Page 397, Sec. 325	36-37

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action in damages for personal injuries sustained by the plaintiff, Mrs. Eugene Adler, against the American Mutual Liability Insurance Company, the insurance carrier of the Hart Theatre, under a provision of the Louisiana Statutes authorizing direct action against the insurer (Act 55 of 1930). The suit was filed in the United

States District Court for the Eastern District of Louisiana, Baton Rouge Division. The basis of the jurisdiction of the District Court was diversity of citizenship.

On August 31, 1941, the plaintiff, Mrs. Eugene Adler, was emerging from the Hart Theatre, on Convention Street in the City of Baton Rouge, when she slipped and fell, sustaining a fracture of the right limb just above the knee. The place where Mrs. Eugene Adler, the plaintiff, slipped and fell, was on the terrazzo pavement or sidewalk in front of the Hart Theatre. The Hart Theatre was a newly constructed theatre, the same having been completed and opened for business on June 21, 1941. The sidewalk along the northern side of Convention Street in front of the Hart Theatre had been laid there by the contractors who built the Hart Theatre. A judgment was entered upon a jury verdict awarding damages in the amount of Five Thousand Dollars ($5,000.00) and expenses in the amount of One Thousand Eight Hundred and Four and 98/100 ($1,804.98) Dollars, with legal interest and costs.

The judgment of the District Court was affirmed by the Circuit Court of Appeals for the Fifth Circuit which denied an application for a rehearing.

BASIS OF THIS COURT'S JURISDICTION.

The jurisdiction of the Supreme Court to review the judgment of the Circuit Court of Appeals by writ of certiorari is sustained by the United States Judicial Code, Section 240 (28 U. S. C. A., Section 347). Rehearing was denied by the Circuit Court of Appeals for the Fifth Cir-

cuit on May 2, 1944. (The case does not appear to have been reported). A stay order was granted on May 8, 1944. This petition will be filed on or before June 7, 1944.

The jurisdiction of the District Court was based upon diversity of citizenship, the complainant being a citizen of the State of Louisiana and the defendant being a corporation incorporated under the laws of the State of Massachusetts; and upon the amount in controversy being in excess of Three Thousand Dollars, exclusive of interest and costs. The statutory authority for this jurisdiction is the United States Judicial Code, Section 24 (28 U. S. C. A., Section 41 (1)). Jurisdiction of the Circuit Court of Appeals was based upon the United States Judicial Code, Section 128 (28 U. S. C. A., Section 225).

QUESTIONS PRESENTED.

The specific questions presented are:

(1) Whether this defendant is the proper defendant: whether an abutting property owner, or his tenant, in a municipality which has absolute control, power, and authority with respect to the construction and maintenance of its public sidewalks, can be held liable for an injury sustained on a public sidewalk when the abutting owner, or his tenant, has not created a dangerous condition amounting to a nuisance.

(2) Whether the duty and responsibility imposed upon the municipality by its charter, whereby the municipality has complete power and authority to require

that the public sidewalks be constructed and maintained in a reasonably safe condition, at the cost and expense of the abutting property owner, is a *public* duty; and if so, whether a *private* action will lie for breach of such *public* duty.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1) That the Circuit Court of Appeals has resolved important questions of local law contrary to the applicable statutory provisions as interpreted by the Courts of Appeal and the Supreme Court of the State of Louisiana.

(2) The Circuit Court of Appeals has decided important questions of local law contrary to the well settled jurisprudence of the State of Louisiana; and the judgment entered and affirmed upon the jury verdict awarding damages is in conflict with the jurisprudence of the State of Louisiana.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Honorable Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its Docket No. 10,797, American Mutual Liability Insurance Company, Appellant, v. Mrs. Eugene Adler, Appellee, to

the end that this cause may be reviewed and determined by the Court as provided by the Statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

American Mutual Lialibity Insurance Company,
Petitioner.

By Justin C. Daspit,
Member of the Bar of the Supreme Court of the United States,
Louisiana National Bank Building,
Baton Rouge, Louisiana.

Of Counsel:

J. ELTON HUCKABAY,
SARGENT PITCHER, JR.,
H. ALVA BRUMFIELD, JR.,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the District Court of the United States for the Eastern District of Louisiana has not been officially reported.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit does not appear, at the time of the preparation of this brief, to have been officially reported. The opinion is very brief and the same is re-

produced in full below. Rehearing was applied for and denied May 2, 1944.

OPINION OF COURT OF APPEALS.

"Appeal from the District Court of the United States for the Eastern District of Louisiana.

(March 28, 1944.)

"Before Hutcheson, Holmes, and Lee, Circuit Judges.

"HOLMES, Circuit Judge: This appeal is from a judgment entered upon a jury verdict awarding damages and expenses to Mrs. Eugene Adler for personal injuries sustained by her when she slipped and fell as she was leaving the Hart Theatre in Baton Rouge, Louisiana. Aside from errors assigned relative to amendments to the pleadings and the admission of testimony, which we have examined and found to be without merit, the only question presented is whether there was substantial evidence to support the finding of the jury that the negligence of the theatre was the proximate cause of the fall.

"We find in the record substantial evidence to support this synopsis of the facts as found by the jury: The accident occurred on a rainy afternoon in August, 1942. The floor of the foyer of the theatre was made of terrazzo, and the part thereof in front of the ticket office and nearest the sidewalk, not being protected from the weather, was very wet when appellee emerged from the theatre. She was an elderly lady, and was walking across the foyer with slow, cautious steps when she began to slip upon the wet terrazzo in front of the ticket office. She tottered, off-balance, for several steps before she finally went down on the sidewalk and

sustained her injuries. The floor of the foyer was negligently constructed in that the terrazzo surface did not contain sufficient brassy aggregate or other abrasive substance to enable it to meet the standard requirements of the industry, or to make it reasonably safe for use as a walkway when wet. Although the theatre, as constructed, was not opened for business until 1941, numerous persons had found the foyer floor dangerously slippery when wet, and some of them had fallen there.

"Obviously, the judgment entered upon the jury verdict should be

AFFIRMED."

JURISDICTION.

The jurisdiction of the Supreme Court to review the judgment of the Circuit Court of Appeals by writ of certiorari is sustained by the United States Judicial Code, Section 240 (28 U. S. C. A., Section 347). Rehearing was denied by the Circuit Court of Appeals for the Fifth Circuit on May 2, 1944. (The opinion of the United States Circuit Court of Appeals for the Fifth Circuit does not appear to have been officially reported at the time this brief is written).

The jurisdiction of the District Court was based upon diversity of citizenship, the complainant being a citizen of the State of Louisiana and the defendant being a corporation incorporated under the laws of the State of Massachusetts; and upon the amount in controversy being in excess of Three Thousand Dollars ($3,000.00), exclusive of interest and costs. The statutory authority for this jurisdiction is the United States Judicial Code, Section 24 (28 U. S. C. A., Section 41 (1)). Jurisdiction of

the Circuit Court of Appeals was based upon the United States Judicial Code, Section 128 (28 U. S. C. A., Section 225).

STATEMENT OF THE CASE.

This is an action in damages for personal injuries sustained by the plaintiff, Mrs. Eugene Adler, against the American Mutual Liability Insurance Company, the insurance carrier of the Hart Theatre.

On *August 31, 1941*, the plaintiff, Mrs. Eugene Adler, was emerging from the Hart Theatre, on Convention Street in the City of Baton Rouge, when she slipped and fell, sustaining a fracture of the right limb just above the knee. Mrs. Adler had remained in the Hart Theatre about three hours to see a moving picture and the accident occurred at about 6:15 P. M. The place where Mrs. Eugene Adler, the plaintiff, slipped and fell, was on the terrazzo pavement or sidewalk in front of the Hart Theatre. The Hart Theatre was a newly constructed theatre, the same having been completed and opened for business on *June 21, 1941*. The sidewalk along the northern side of Convention Street in front of the Hart Theatre had been taken up and terrazzo pavement had been laid there by the contractors who built the new Hart Theatre.

The bill of complaint charges that the slope of the terrazzo pavement in front of the Hart Theatre was sharper than the slope of the floor of the foyer, "and this said area was thus deceptive and dangerous, to the knowledge of the operators of the Hart Theatre, their officers, agents and employees, because of the angle of the slope, particularly when it was wet, and said area was wet and

slippery and dangerous when petitioner fell and this wet and slippery and dangerous condition directly caused petitioner to fall." (R. 4).

The bill of complaint alleges that the area where Mrs. Adler slipped and fell could have been rendered safer if a rubber mat or some other covering had been placed over the slope when it was wet and slippery; but that this had not been done.

The defendant denied all liability and, in the alternative, pleaded contributory negligence.

The plaintiff demanded judgment in the sum of Fifty Thousand and No/100 ($50,000.00) Dollars, with interest and costs, and trial by jury. The case was tried twice by jury. The first trial resulted in a mistrial.

The jury rendered a verdict for Five Thousand and No/100 ($5,000.00) Dollars plus all expenses.

The court denied the motion of defendant for a directed verdict, or in the alternative, a new trial, and judgment was entered in favor of plaintiff, Mrs. Eugene Adler, in the sum of Six Thousand Eight Hundred Four and 98/100 ($6,804.98) Dollars, with legal interest and costs.

The judgment of the District Court was affirmed by the Circuit Court of Appeals on March 28, 1944. The application for rehearing was filed April 13, 1944, and the same was denied May 2, 1944. An order staying the mandate was entered May 8, 1944. This brief in support of the petition will be filed on or before June 7, 1944.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in stating that plaintiff "was walking across the foyer with slow, cautious steps when she began to slip upon the wet terrazzo in front of the ticket office," since the terrazzo in front of the ticket office is the sidewalk and not the foyer.

2. The Circuit Court of Appeals erred in holding that the floor of the foyer was negligently constructed in that the terrazzo surface did not contain sufficient brassy aggregate or other abrasive substance to make it reasonably safe for use as a walkway when wet, whereby the Court thus attributes the proximate cause of the accident to the condition of the foyer, when in truth and in fact, plaintiff "went down on the sidewalk and sustained her injuries," to quote the language of the Court.

3. The Circuit Court of Appeals erred in stating thus: "Although the theatre, as constructed, was not opened for business until 1941, numerous persons had found the foyer floor dangerously slippery when wet, and some of them had fallen there," for the reason that the record does not establish that numerous persons had found the foyer floor dangerously slippery when wet since no person had fallen on or off the premises prior to August 31, 1941, the date on which plaintiff fell; and for the further reason that the record does not conclusively establish that any person had ever fallen in the foyer of the Hart Theatre up to the date of trial on April 15, 1943.

4. The Circuit Court of Appeals erred in not holding that the City of Baton Rouge, by virtue of its charter, which is a legislative act or statute, is vested with absolute power, authority, control and dominion over its streets and sidewalks "to order their repair or replacement or the building of new sidewalks when necessary" and, hence, the abutting property owner, or his tenant, cannot be held liable for an injury sustained on the sidewalk where the abutting owner has not created a dangerous condition amounting to a nuisance.(1)

5. The Circuit Court of Appeals erred in not holding that under the law of the State of Louisiana, where the municipality has complete power and authority to construct and maintain the sidewalks at the expense of the abutting owner, as in the case at bar, the abutting owner, or his tenant, cannot be held liable for an injury sustained on the sidewalk where he has not created a dangerous condition amounting to a nuisance.

6. The Circuit Court of Appeals erred in not holding that the duty imposed upon the municipality to see that its sidewalks are constructed and maintained in a reasonably safe condition is a public duty, for the breach of which a private action does not lie; and, hence, the verdict and judgment in the case at bar are in conflict with the jurisprudence of the State of Louisiana.(2)

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(1) Act 169 of 1898, as amended by Act 224 of 1938, p. 526.

(2) Betz v. Limingi, 46 La. Ann. 1113, 15 South. 385;
McGurk v. City of Shreveport, 191 So. 553;
Varnado v. City of Baton Rouge, 5 La. App. 238;
Henrichs v. N. O. Public Service, Inc., et al., 192 So. 383;
Judice v. Village of Scott, 168 La. 111, 121 So. 592.

ARGUMENT.

May It Please the Court:

This case revolves about the terrazzo sidewalk in front of the Hart Theatre and the terrazzo floor in the foyer or entrance to the theatre. It is therefore pertinent to inquire what is terrazzo? Terrazzo is composed of cement and marble chips in the proportion of 30% cement and 70% marble chips. (R. 71). In the building trade, terrazzo is considered a standard type of floor. (R. 91). The abrasive material that is put in terrazzo for the purpose of preventing slipping may be either aluminum aggregate or what is called carborundum. The quantity seems to vary all the way from 15% to 40%, depending upon the incline and the use that will be made of the floor. (R. 100).

UNDISPUTED FACTS.

The Hart Theatre opened for business on *June 21, 1941.* The complainant sustained an injury on the terrazzo sidewalk in front of the Hart Theatre on *August 31, 1941.* (R. 3). The average number of people attending the theatre *each* day was 1000, and on some days there were as many as 4000. (R. 82). The Manager, Robert H. Hines, estimated that over a half million people had been in and out of the Hart Theatre between the opening date, *June 21, 1941,* and the *fall of 1942.* He estimated that even more than that number passed in front of the Hart Theatre during the same period. (R. 82).

The record in this case is barren of any evidence to show that any individual ever fell or sustained an in-

jury on the terrazzo—whether it be in the foyer or on the sidewalk—*prior* to *August 31, 1941*, the date complainant fell on the sidewalk. (R. 81). The Circuit Court of Appeals is in error in fixing this date as "an afternoon in August 1942." The record fails to show conclusively that any person ever fell in the *foyer*—on the *premises*—of the Hart Theatre. One person is said to have fallen "about on a line with the box office and the terrazzo sidewalk." This was five months *after* plaintiff fell. (R. 149).

Another person testified that she fell on the premises, but under cross-examination stated: "I was on Convention Street." (R. 149). The street or sidewalk begins at the property line. She could not have been on the premises if she was on Convention Street.

SUMMARY OF ARGUMENT.

Briefly, the record in this case shows:

That the Hart Theatre was constructed on Convention Street, between Lafayette Street and Third Street, in the City of Baton Rouge, according to plans approved by Paramount Richards Theatres, Inc., and its subsidiary, Capitol Theatre, Inc. (R. 133).

That the terrazzo sidewalk in front of the Hart Theatre and in its foyer was laid by the contractor who built the theatre building. (R. 133).

That the Hart Theatre opened for business June 21, 1941. (R. 133). That since the opening date the terrazzo which was laid in front of the theatre and in its

foyer has remained in the same condition since its construction. (R. 133). That since its opening date the Hart Theatre has been operated by Capitol Theatre, Inc., a subsidiary of Paramount Richards Theatres, Inc. (R. 133).

That the Hart Theatre and the terrazzo sidewalk in front of it were constructed according to permit of the municipal authorities, and the sidewalk was approved by the City Engineer of the City of Baton Rouge. (R. 120). That the terrazzo sidewalk in front of the Hart Theatre is the same grade and level and conforms to the cement sidewalk on each side of it. (R. 27). That the said terrazzo sidewalk has been used by the public as a sidewalk, without change, since its approval by the City Engineer on June 21, 1941. (R. 133).

That the complainant, Mrs. Eugene Adler, was a frequent visitor to the Hart Theatre. That on August 31, 1941, she attended the Hart Theatre accompanied by her daughter, Mrs. Camille Moses. (R. 73). That on leaving the Theatre at about 6:10 P. M., Mrs. Moses left her mother in the foyer to come out alone while she, Mrs. Moses, went to get the parked automobile and drive it to the front of the theatre where she intended to pick up her mother and take her home. (R. 73).

That it was raining when complainant emerged from the theatre. (R. 36, 37). That complainant came out of the foyer on the right-hand side, or west of the ticket booth, walked in front of the ticket booth towards Third Street, going east, and she then started slipping and fell on the terrazzo sidewalk in front of the Hart Theatre.

(R. 38, 41). That from her fall on the terrazzo sidewalk in front of the Hart Theatre complainant sustained a fracture of the right limb above the knee. (R. 6).

That complainant was an old lady 75 years of age; she had arthritis in both knees, and she walked with the aid of a cane. (R. 28, 29). That no person had ever fallen on the terrazzo sidewalk in front of the Hart Theatre before the date on which complainant fell, August 31, 1941. (R. 81).

That the terrazzo, both in the foyer and on the sidewalk, contains approximately 20% of abrasive aggregate. (R. 109). That terrazzo is considered a standard flooring for commercial purposes. (R. 100).

That between the dates June 21, 1941, and April 15, 1943—a period covering 671 days—671,000 persons went into and came out of the Hart Theatre, an average of 1000 each day. (R. 82). Of that number only 2 persons ever sustained injury from a fall on the terrazzo *sidewalk* in front of the Hart Theatre. (R. 33, 145). An even greater number of people passed in front of the Hart Theatre. That there was no canopy or permanent shed, other than the one in front of the Hart Theatre, on Convention Street, between Lafayette and Third Streets. (R. 81).

That the complainant, Mrs. Eugene Adler, fell on the terrazzo sidewalk in front of the Hart Theatre, is not in dispute. There is not a single discordant note—the testimony is unanimous—on this point. One witness placed her feet after the fall about one foot from the curb

and resting on the concrete sidewalk nearest Third Street. (R. 141).

From the above salient facts, which are supported by the record, the case appears to be overwhelmingly with the petitioner. Considering these facts—all the facts in the record—and applying the law which governs in like cases, the conclusion seems inevitable that the wrong party has been made the party defendant. A sidewalk is a public thing and, therefore, one suing for damages caused by a faulty sidewalk, has no right of action against the abutting property owner. *Varnado v. City of Baton Rouge, et al.*, 5 La. App. 238.

The decided *weight of authority* is to the effect that statutes or ordinances requiring abutting owners to construct or maintain and repair sidewalks adjoining their premises, such work to be done by the municipality at the expense of the abutting owners, in case of their failure to construct or repair, *does not impose liability upon such owners*, either to travelers or to the city, for injuries by reason of a *defective walk*.

The paramount obligation for maintaining sidewalks in a reasonably safe condition is placed with the municipality. The duty imposed on the abutting property owner is one owed solely to the municipality. *McGurk v. City of Shreveport*, 191 So. 553.

This is an action for damages resulting from an injury sustained in a fall on a sidewalk. It is a suit by a private individual against a private corporation.

The duty to maintain its sidewalks in a reasonably safe condition is a *public* duty imposed upon the municipality. *Private* actions do not lie for breach of *public* duty. *Betz v. Limingi*, 46 La. Ann. 1113, 15 So. 385, 49 Am. St. Rep. 344; *Henrichs v. N. O. Pub. Service, et al.*, 192 So. 383; *Louisiana Acts, 224 of 1938, p. 526.*

In federal courts, except in matters governed by the Federal Constitution or by Acts of Congress, the law applied in any case is the law of the state.

We respectfully remind the court—and this is very important—that there is *no nuisance feature* about this case. There was and is no obstruction nor obstacle in or on the sidewalk in question. The sidewalk in front of the Hart Theatre presents a smooth, level surface. It is of the same grade and conforms to the concrete sidewalk on either side of it. It was constructed to be used as a sidewalk. There is nothing about it or its construction which is foreign to the purpose for which a sidewalk is used. There is, in short, *no nuisance.*

Under these circumstances, it is the settled jurisprudence of the State of Louisiana that the abutting property owner is not liable for an injury sustained on a public sidewalk. There is no right of action. The duty to maintain and keep safe a *public* sidewalk is a *public* duty, for the breach of which a *private* action does not lie. That is the jurisprudence as announced by the Supreme Court of Louisiana. *Betz v. Limingi*, 46 La. Ann. 1113, 15 South. 385.

A DISPUTED POINT.

That plaintiff *fell* upon the sidewalk and not upon the premises occupied by the Hart Theatre is not in dispute. The only dispute is whether plaintiff started slipping in the foyer or on the sidewalk.

A witness for plaintiff, Miss Jessie Carmena, testified that plaintiff started slipping within the foyer of the Hart Theatre—that she slipped across the terrazzo in front of the ticket office and when the fall was completed plaintiff came to rest about one foot from the curbing and partly on the adjoining concrete sidewalk next to Third Street. (R. 135, 141).

The absurdity of this contention can be readily shown. The plaintiff came out of the theatre on the right-hand side. (R. 135). This is the west side. When plaintiff came to rest she was partly on the adjoining concrete sidewalk next to Third Street. (R. 141). This is the east side. Therefore, plaintiff's course was diagonally across the terrazzo sidewalk in front of the ticket office, as shown on sketch marked "P-13" (R. 160).

The terrazzo sidewalk from concrete to concrete measures 16 feet 4 inches, and from the property line to the curb it measures on the west side 11 feet 3 inches, and on the east side 10 feet 10 inches. The ticket office is in the center and flush with the property line. (R. 160).

By superimposing a right-angled triangle upon Sketch marked "P-13", the distance from the foyer near the letter "B" on the sketch diagonally across the terrazzo sidewalk to a point about one foot from the curb on the east side, the hypothenuse of the right-angled triangle will

be the distance plaintiff slipped before coming to rest partly on the concrete.

The perpendicular of the triangle to one foot of the curb will be ten feet and the base of the triangle parallel with and about one foot from the curb will also be ten feet. The square of the hypothenuse is equal to the sum of the squares of the other two sides. The computation demonstrates that the hypothenuse is 14.14 feet.

The square of the perpendicular 10 x 10 equals 100. The square of the base 10 x 10 equals 100. The sum of the two squares is 200. The square of the hypothenuse 14.14 x 14.14 equals 199.93 Q. E. D.

Hence, plaintiff, according to this witness, slipped a distance of 14.14 feet diagonally across the terrazzo sidewalk and came to rest partly on the concrete sidewalk about one foot from the curb. (R. 135, 141).

Mrs. Eugene Adler, the plaintiff, is an elderly lady seventy-five (75) years of age (R. 28); she had arthritis in both knees and she walked with the aid of a cane (R. 29). The testimony of the witness, considered as a whole, is indeed fantastic. It taxes the imagination to understand it!

The focal point of judicial review of a jury finding is the reasonableness of the particular inference or conclusion drawn by the jury.

We submit with great respect that the conclusion drawn by the jury in the case at bar is unreasonable because it is based upon the testimony of this witness; and the correctness of her testimony appears impossible.

IRRECONCILABLE.

The testimony of the plaintiff and that of Mrs. Elizabeth Gerding cannot be reconciled with that of Miss Jessie Carmena.

The plaintiff testified that she started slipping out in front of the ticket office. (R. 38).

"Q. Let me change the question. You are very sure you were in front of the ticket booth (R. 160) when you slipped and fell?

"A. Yes." (R. 38).

The plaintiff testified that she was going towards Third Street, towards the east side, and, she continued, "I started slipping then." (R. 41).

The testimony of Mrs. Elizabeth Gerding, who was in the ticket booth selling tickets, definitely places the plaintiff on the sidewalk when she slipped and fell. This is her testimony:

"Q. Will you explain to the jury what you were doing what you saw and what you did?

A. I was selling tickets, and Mrs. Adler came out the show on my right, and she came out to the box office, and she caught hold of a little receptable I have there, and she smiled at me, and I saw her take at least six or eight steps, and some man asked me to call a taxi, and I heard someone scream and I looked up and Mrs. Adler was lying on the sidewalk.

Q. About how far away?

A. At least five feet.

Q. Which way was she walking from the theatre booth?
A. Walking at an angle towards Third and Convention street.
Q. Was she using a cane?
A. Yes, she was using a cane." (R. 115, 116).

BILL OF COMPLAINT.

To carry the comparison a step further, we quote, in part, Article 3 of plaintiff's complaint, viz:

"3

The place where petitioner slipped and fell was near the front of the ticket office of the said Hart Theatre, on terrazzo or glazed tile pavement which had been specifically laid in front of said Theatre for use of patrons of the said theatre;" * * * (R. 3).

The testimony of plaintiff and of Mrs. Elizabeth Gerding and the allegations contained in the Bill of Complaint are in direct conflict with the testimony of Miss Jessie Carmena.

CASES RELIED ON BY PLAINTIFF.

The following cases appear to be strongly relied on by plaintiff:

Degeneres v. Pan-American Petroleum Corp., 153 So. 481;
Indemnity Ins. Co. of North America v. Hinkle, 127 Fed. 2d. 655.

The cases relied on by plaintiff can be readily distinguished from the case at bar.

The *Degeneres* case is a sidewalk case in the City of New Iberia, Louisiana. The defendant, Pan-American Petroleum Corporation, constructed a gasoline tank under the cement sidewalk and placed an iron intake pipe there for the purpose of filling the tank with gasoline. The pipe was about two and one-half (2½") inches in diameter and *projected* about two and one-half (2½") inches *above the pavement*. The projecting pipe constituted a "dangerous obstruction in the sidewalk". The municipal authorities were not consulted and gave no consent, but never objected to what was done. Plaintiff was awarded judgment in the amount of Two Thousand, One Hundred Ten and No/100 ($2,110.00) Dollars.

In the case at bar there is *no obstruction* in the sidewalk, nor anything foreign to the purpose for which a sidewalk is constructed.

The sidewalk in front of the Hart Theatre is of the same level, grade, and slope as the sidewalk adjoining on either side. It *conforms* with the sidewalk on either side of it. (R. 27). The obstruction in the *Degeneres* case was a *nuisance*. It was so charged in the suit. The *Degeneres* case does not decide this case.

In the *Hinkle* case the accident occurred in a cafeteria in Shreveport, Louisiana. The plaintiff slipped and fell as she was leaving the cafeteria. It was claimed that the extreme slope of the floor, being surfaced with slippery tile and partially obscured from view by the paneling of the door entering thereon, created a hazardous condition that rendered the foyer unsafe for the use to which it was put.

There is no such claim in the instant case. In the instant case, it is alleged that the terrazzo sloped *from the entrance to the foyer downward to the curb lines;* that *this* slope was *sharper* than the *slope* of the *floor* of the *foyer.* (R. 4). Hence, the so-called "sharper" slope was on the *sidewalk.* But the sidewalk in front of the Hart Theatre *conforms* to the sidewalk on either side of it (R. 27). It is the same level and grade.

In deciding the *Hinkle* case the Court said:

> "There is no dispute as to the exact scene of the accident or the structure and condition of the premises at that place."

In the case at bar, all the witnesses, including plaintiff, testified that plaintiff *fell on the sidewalk.* (R. 38, 41, 115, 116, 141).

There is dispute, however, as to the *structure* and *condition* of the premises. We respectfully submit that the great weight of the evidence is favorable to the defendant.

Surely, the *Hinkle* case does not decide the case at bar. The *Hinkle* case is a *cafeteria* case. The accident occurred *in the cafeteria*—on the *premises.* This case is a sidewalk case. The accident occurred *on the sidewalk* of the City of Baton Rouge.

THE LAW POINT.

This brings us to a discussion of the real law point in this litigation: Can the defendant be held liable for an *injury sustained on the sidewalk?* We believe the answer to that question is, "No". We believe we are supported in that contention by the settled law of the State of Louisiana.

CHARTER OF BATON ROUGE.

The charter of the City of Baton Rouge is Act 169 of 1898, as amended. The last amendment of Section 20 of said Act, which is the section pertaining to sidewalks, is Act 224 of 1938, page 526.

We quote below the pertinent parts of *Section 20* of said Act, with respect to the absolute power, control and dominion by the City over the streets and sidewalks of the City of Baton Rouge, to-wit:

> "The Council shall have the power to enact all laws and ordinances necessary * * * to open, establish, alter, close and vacate streets or portions thereof; to pave, grade, and otherwise improve streets and sidewalks and to alter or change the grade, or to fix new grades, of sidewalks from time to time and *to order their repair or replacement or the building of new sidewalks when necessary,* or *when the grade or level or the paving of a street renders the grade of the existing sidewalk unsuitable, all of same to be at the cost and expense of the abutting property owner;* to open new streets, or continue or broaden old ones, expropriating land for this purpose, in accordance with the general laws of the State; to keep streets and crossings, bridges, canals and ditches clean and in repair, and *compel owners*

of property or tenants, to keep their sidewalks and neutral ground between the property line and the street curb line clean and in repair; * * * to prescribe the duties of a building inspector and fix his compensation and *to provide regulations for the construction, maintenance and repair of buildings and the issuance of permits for all work of erecting, maintaining or repairing structures;* * * * to levy taxes, licenses and assessments; to exercise *general police powers*, including the issuance of *permits* to control, supervise, and regulate under such general police powers and fix reasonable fees and charges therefor to cover all costs and expenses of such control, supervision and regulations, and to *punish by fine or imprisonment, or both, all persons transgressing its ordinances,* * * *." (Italics ours).

Thus we observe that the municipal corporation of Baton Rouge is invested by statute with complete power, authority and control over the streets and sidewalks within its corporate limits. It can order the repair or replacement or the building of new sidewalks, when necessary; it can compel owners, or their tenants to keep their sidewalks and neutral ground between the property line and the street curb line clean and in repair; it can provide regulations and issue permits for all work of erecting, maintaining and repairing structures—all of same to be at the cost and expense of abutting property owner.—Even this is not all: it can punish by fine or imprisonment, or both, all persons transgressing its ordinances.

In the authority, power, and control of its streets and sidewalks, the City of Baton Rouge is supreme!

But, incident to its supreme power and authority, is a corresponding obligation and responsibility. This is properly so, for a sidewalk is part of the public street, and a public street is for the common use of a city and its inhabitants and strangers alike. *Louisiana Civil Code, Articles 450, 454, 458.* The title to municipal sidewalks and streets is in the public. *Judice v. Village of Scott,* 168 La. 111, 121 So. 592.

The sidewalk belongs to the city—to all the people —not to the abutting property owner. Hence, the obligation and responsibility for maintaining the sidewalks in a reasonably safe condition rests upon the municipality. The duty of the abutting property owner and, indeed, his responsibility is only *secondary* and is one owed *solely* to the municipality. It has been so held by the Appellate Courts and the Supreme Court of Louisiana.

THE McGURK CASE.

Mrs. Euphrasia McGurk brought an action against the City of Shreveport and W. E. Compere for injuries sustained in a fall on the sidewalk. The complaint was made that the defendant Compere, an abutting property owner, maintained the sidewalk in question in a defective condition in that it possessed an unusual slope or depression.

In analyzing the case the Court of Appeal reviewed the jurisprudence of this State on the subject, and said:

> "The case of Varnado v. City of Baton Rouge, et al., 5 La. App. 238, decided by the Court of Appeal of the First Circuit, involved a damage claim for

injuries sustained by the plaintiff while walking on a sidewalk. She impleaded as defendants both the abutting property owner and the City of Baton Rouge, and charged that the walk was in a dangerous and unsafe condition. The owner was sought to be held liable by reason of certain provisions of the charter of that city, which are almost identical with those of the City of Shreveport that are relied on by plaintiff in the case before us. The court followed Betz v. Limingi and Burke v. Tricalli, both supra, and held that the petition disclosed no cause of action as against the property owner.

"The above jurisprudence appears to be in accord with that of most of the courts of the other states. In a note found in the annotations reported in 41 A. L. R. 212, 217, the annotator says:

" 'The decided weight of authority is to the effect that statutes or ordinances requiring abutting owners to construct or maintain and repair sidewalks adjoining their premises, such work to be done by the municipality at the expense of the abutting owners in case of their failure to construct or repair, does not impose liability upon such owners, either to travelers or to the city, for injuries by reason of a *defective walk*.'

"A like expression is noticed in Headley v. Hammond, 97 Mont. 243, 33 P. 2d. 574, 93 A. L. R. 794, 799, 803.

"(1-3) Our construction of the pertinent provisions of the Shreveport charter, which appears to be fortified by the above discussed authorities and many others touching the subject, is that the *paramount* or *primary* obligation for maintaining *sidewalks* in repair is placed with the municipality. Of course, such provisions also impose a duty on the owners of the property fronting thereon; but it is only *secondary* and is one owed *solely* to the municipality. The latter possesses the right, as the char-

ter states, to make all needful repairs at the expense of the owners upon their failure to do so; and, consequently, it may be said that *absolute control* of the walks is vested in the municipality. As the owners have no control or supervision thereof, certainly there can be *no liability* on their part to individuals who are injured because of a state of disrepair. Their responsibility is in favor of the municipality, as above stated, and then only to the extent of the costs of making the necessary repairs." (Italics ours). *McGurk v. City of Shreveport*, 191 So. 553.

TWO IN 671,000.

We pause to remind the court that two, and only two, persons in 671,000 sustained injury by falling on the terrazzo sidewalk in front of the Hart Theatre. The Hart Theatre opened for business on *June 21, 1941*. This case was tried *April 15, 1943*. The average number of people attending the Hart Theatre each day was 1,000. (R. 82). Six hundred and seventy-one days, and more, intervened between the opening date of the Hart Theatre and the trial of this case. Hence, 671,000 people visited the Hart Theatre between the opening date and the date of this trial, and this plaintiff and another are the only two persons of the 671,000 patrons who sustained an injury by *falling on the sidewalk* in front of the Hart Theatre.

Mrs. Camille Moses, the daughter of plaintiff, testified as follows:

"Q. What was your purpose in going to the theatre with your mother?

"A. I have always gone everywhere with my mother and then I went with her to take care of her."

* * *

"Q. If you had known it was raining that day, would you have left her in the theatre to come out by herself?

"A. No, I would not." (R. 75).

This is natural and commendable. It is possible and, we might add, probable, that plaintiff would not have fallen had Mrs. Moses been with her to take care of her. The plaintiff is an old lady 75 years of age (R. 28); she had arthritis in both knees, and she walked with the aid of a cane (R. 29).

The record of this case fails to show conclusively that any person ever fell in the *foyer*, that is, on the *premises* of the Hart Theatre. The record fails to show that any person ever fell on the terrazzo—whether it be in the foyer or on the sidewalk—*before* the date on which complainant fell, to-wit: *August 31, 1941.*

BONE OF CONTENTION.

The bone of contention—the real law point in this litigation is whether this defendant is the proper defendant. We contend that the abutting property owner cannot be held liable for an injury sustained on the *sidewalk* in the instant case.

It is true that the contractor who constructed the Hart Theatre also laid the terrazzo paving or sidewalk. And what an attractive sidewalk it is! It was laid with the knowledge of the municipal authorities. They issued the permit for its construction. It was constructed in compliance with the permit; the city engineer of the City

of Baton Rouge inspected the terrazzo sidewalk and it met with his approval. (R. 121). From that day on the sidewalk was a public thoroughfare open to the public, used by the public, and it was the responsibility of the municipality.

We desire respectfully to remind the court that this sidewalk constitutes no nuisance. There is no pipe projecting above the sidewalk, as in the *Degeneres* case, *supra*, relied upon by ingenious counsel. The terrazzo sidewalk in front of the Hart Theatre presents a smooth and level surface of the same grade as the concrete sidewalk adjacent thereto. It conforms with the sidewalk on either side of it. (R. 27). There is absolutely nothing in the construction of this sidewalk which is entirely foreign to its use as a sidewalk. The *Degeneres* case is completely out of the picture.

LOUISIANA LAW.

Under the law of Louisiana an abutting property owner is not liable in a case such as this. The abutting property owner has created no dangerous condition amounting to a nuisance. The responsibility rests upon the municipality which has complete power and authority to maintain the sidewalks in a reasonably safe condition. It is a *public* duty resting upon the municipality, and for the breach of which a *private* action does not lie. It was so held in the leading Louisiana case, *Betz v. Limingi*, 46 La. Ann. 1113, 15 South. 385.

The plaintiff's wife was injured on the banquette or sidewalk in front of the defendant's house in the City

of New Orleans, while passing in front of the same. It is alleged that the injury was in consequence of the defendant having neglected to repair the banquette or sidewalk. It is not alleged that the injury resulted from any *obstacles* or *obstructions* (as in the *Degeneres* case) placed on the sidewalk by the defendant. There was judgment for defendant rejecting plaintiff's demand.

The provisions of the charter of the City of New Orleans are very similar to those of the City of Shreveport and also to the provisions found in the charter of the City of Baton Rouge. The provisions of the charter of the City of Baton Rouge confer even more power and authority. Under its charter the City of Baton Rouge has authority to order the repair or *replacement or the building of new sidewalks when necessary*, all of same to be at the cost and expense of the abutting property owner. See Act 224 of 1938, page 526.

Speaking of the charter of the City of New Orleans, in the *Betz* case, *supra*, the Court said:

> "By this legislation the city is not relieved of responsibility. It is still its duty to do the work, and as it has no authority to shift the responsibility for failure to do it, it remains answerable for injuries resulting from negligence of the owner, or its own *omission* to act." (Italics ours).

It was contended by plaintiff that the obligation to keep the banquette or sidewalk in repair imposed a duty upon the abutting owner in favor of all persons who use them, and that the neglect to keep them in repair, in consequence of which anyone lawfully using the sidewalk is

injured, renders the owner liable to him in damages. That contention was answered by the Louisiana Supreme Court thus:

> "But the duty imposed was not for the benefit of individuals. The duty was to the whole public of the city, to all its inhabitants who own the banquettes and streets in common. The neglect to repair the banquettes was such a breach of public duty that its punishment must be in some form of public prosecution, and *not by a suit for damages by an individual.*" (Italics ours).

The judgment of the lower Court rejecting the plaintiff's demand was affirmed.

THE HENRICHS CASE.

We have a recent case decided by the Orleans Court of Appeal, December 11, 1939, in which the abutting property owner was absolved from liability. We refer to the case of *Henrichs v. New Orleans Public Service, Inc., et al.*, 192 So. 383.

Mrs. Emelia Henrichs, widow of Edward G. Smith, brought suit for damages against the New Orleans Public Service, Inc., the Sewerage & Water Board of New Orleans and Leon T. Weill, claiming that the defendants were liable to her *in solido* for injuries she received when she fell upon the paved portion of the sidewalk abutting the premises 2400 Milan Street in the City of New Orleans. She averred that her fall was due to the defective condition of the sidewalk and that, as a result of the accident, she sustained a fracture of her right leg. She charged that Weill was the abutting property owner and

the other two defendants made certain excavations at or near the point where the accident occurred. That Weill was liable because he was the *owner* of the premises abutting the sidewalk on which she fell; that, under the law, it was his duty to keep the sidewalk in repair and that he failed to do so.

The case was before the Court on an exception of no cause or right of action filed by defendant Weill and sustained by the lower Court. The question presented was whether Wiell, as the abutting property owner, was liable in damages resulting from injuries caused by the defective sidewalk. It was contended that the charter of the City of New Orleans imposed a duty upon the abutting property owner to keep and maintain the sidewalks in good order and condition. The Court said that in *Betz v. Limingi*, 46 La. Ann. 1113, 15 So. 385, 49 Am. St. Rep. 344, it was held that the provision of the City Charter, requiring the property owner to keep the banquette in front of his premises in repair, imposes upon him a public duty and that a person injured by his neglect to fulfill such duty *cannot maintain a private action against him.*

Counsel in his argument contended that the decision in the *Betz* case is not well founded and that it amounts to a judicial veto of the will of the Legislature. The Court said:

> *"This proposition should be addressed to the Supreme Court and not to us. It is our duty to follow the jurisprudence established by the highest Court of this State."* (Italics ours).

The judgment sustaining Weill's exception was affirmed.

We submit with great respect that the law as announced by the courts of the State of Louisiana is here controlling under the rule of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

ABUNDANCE OF AUTHORITY.

There is an abundance of authority on the point that abutting owners are not liable in damages for injuries resulting from defective sidewalks. This is so even though the sidewalk has been constructed by the abutting property owner. The courts of Louisiana must be right, for the courts in many other jurisdictions have held to the same effect.

THE GENERAL RULE.

The general rule with respect to the liability of a municipality for defects in sidewalks is clearly and succinctly stated in Ruling Case Law in the following language:

> "Since the walk is a part of the street, the authority of a municipality over a street and its duty in respect to the safety of its streets, extends to sidewalks, and to cross-walks. Nor is its duty and liability in this respect dependent upon whether it constructed the walk or caused it to be constructed, and it is equally liable for injuries caused by obstructions thereon or defects *therein regardless of whether it was constructed by the municipality or by abutting owners, with or without its authority or direction.* As a rule a municipality is also held liable for injuries resulting from defective side-

> walks, even though they are constructed on private property, *when it treats them as public walks* and *permits them to be used as such.*" (Italics ours). See *13 R. C. L., p. 397, Section 325.*

The case at bar is not unique. Decisions involving the same principles of law may be found in a number of other jurisdictions. This is so because the duty imposed upon the municipality is a *public* duty. The abutting property owner has no authority nor control over the sidewalk. There can be no divided authority. We cite a few cases from other jurisdictions. They are at least persuasive.

McKnight, Et Al., v. City of Seattle,
81 Pac. 998.

This was an action by Annie L. McKnight and husband against the City of Seattle for damages sustained by her while walking upon a cross-walk on one of the public streets of Seattle. She stepped onto a *defective* plank therein, which gave way, throwing her down and seriously injuring her. In affirming the judgment the Supreme Court of Washington said:

> "The walk was *not* built by the city, but by private parties; and it is claimed that there was no sufficient evidence to the effect that the city had accepted it as a part of the highway. But this street was a public street of the appellant city, opened to the use of the public, and the city was bound to keep it in a reasonably safe condition for use by the public. If this sidewalk rendered the street unsafe, it was the duty of the city *to remove it* or repair it, and its duty in this regard is not affected by the fact that it may *not* have constructed the walk." (Italics ours).

Graham v. Albert Lea, 48 Minn. 201,
50 N. W. 1108.

This was an action brought by John H. Graham against the City of Albert Lea to recover for personal injuries sustained by stepping into a hole on a gravel sidewalk *built by Mr. Morin,* who was then an alderman, *in front of his property.* In affirming the verdict and judgment for plaintiff the Court said:

> "If a municipal corporation knowingly permits a way or walk constructed upon one of its streets by a private person, and designed for the use of pedestrians, to remain and to be used, the authorities by their official acts inviting and inducing such use, the duty devolves upon the corporation to keep the way in proper repair as a sidewalk; and it is of no consequence that such way or walk was built of earth, instead of the usual materials." (Syllabus by the Court).

NO NUISANCE.

We respectfully remind the Court that the sidewalk in front of the Hart Theatre where plaintiff fell constitutes *no nuisance.* It is an attractive sidewalk, constructed of terrazzo, skillfully laid. It presents a smooth, level surface, of the same grade as the sidewalk adjacent thereto. It *conforms* with the sidewalk on each side of it. (R. 27). The record fails to show that there is anything about its construction which is foreign to its use as a sidewalk.

In the connection the case of *Calloway v. Newman* is apposite.

Calloway v. Newman Mercantile Co.,
321 Mo. 766, 12 S. W. (2d) 491.

The defendant was the lessee of a building in front of which was a barlock lighting system, which afforded light to the basement of the building. The system was installed in the sidewalk by the owner, and when completed was approved by the city. It consisted of a steel frame, supported by pilasters, in which frame rows or series of glass prisms were set, at regular intervals. When completed the sidewalk presented a smooth, level surface. Some of the prisms were later broken out, and the plaintiff was injured by catching the heel of her shoe in the hole, and falling.

> "The Court holds that the defendant is not liable for the injury sustained, as it was the duty of the city, and not of the abutting owner, to keep the sidewalk in repair."

It also points out that although the particular system of construction was used to afford some private and personal convenience to the owner of the abutting premises, and its tenant, it did not differentiate the case from one wherein planks or stringers may have been broken and loosened, or entirely removed, from a wooden sidewalk, or from one wherein bricks or flagstones may have been broken and loosened, or removed, from a brick or flagstone sidewalk. It is also observed that the case does not come within the category, or class, of cases wherein the abutting property owner, or his tenant, by his affirmative act, *creates a dangerous condition in a street or sidewalk,*

amounting to a nuisance, by making an excavation or *opening therein,* or *by placing some obstruction thereon,* or *adjacent thereto, entirely foreign to its use as a sidewalk,* such as a *coalhole,* a *meter box,* an *open* or *unguarded areaway,* a *light well,* a *sidewalk grating,* an *open manhole,* or *cellar door.*

We have shown that the terrazzo sidewalk in question was constructed in accordance with the permit granted by the municipal authorities and it was approved by the city engineer. Hence, the municipal authorities had notice.

Benton v. City of St. Louis,
118 S. W. 418.

In the case of *Benton v. City of St. Louis,* 118 S. W. 418, the Court said:

> "A city owns and controls its streets as a trustee for the public. It, therefore, stands charged by the law with the primary and bounden duty of keeping them free from nuisances, defects, and obstructions caused by itself or by third parties if it (in the latter instance) had actual or constructive notice thereof in time to abate the nuisance, remove the obstruction, or repair the defect. It cannot shirk that duty, or shift it over to, or halve it with others." See *41 Am. Rep. 325.*

City of Denver v. Hickey,
47 Pac. 908.

In the *City of Denver v. Hickey,* 47 Pac. 908, the Court said:

> "A city which holds the fee of its streets is not relieved of the duty to properly construct and re-

pair the sidewalk in front of the post office because the federal government owns the lots and building thereon. A lot of evidence tended to show the walk was dangerous because of a *slippery surface.*" (Italics ours).

City of Flora v. Naney, 31 Ill. A. 493, 26 N. E. 645.

In the case of *City of Flora v. Naney*, 31 Ill. A. 493, 26 N. E. 645, the Court said:

"The duty of a city to keep a sidewalk within the corporate limits in a reasonably safe condition is not lessened by the facts that the sidewalk lies in an unfrequented street and *was put down by a private person.*" Distinguishing *City of Chicago v. Martin*, 49 Ill. 241.

City of Plattsmouth v. Mitchell, 29 N. W. 593.

This was an action against plaintiff in error for damages resulting from a personal injury to defendant in error occasioned by a defective sidewalk. The verdict was in favor of Mitchell, plaintiff below. One of the main defenses was that the sidewalk was constructed without its authority or direction, but by *private parties.* In affirming the judgment the Supreme Court of Nebraska said:

"Where a sidewalk is constructed on a public street or thoroughfare in a city by an *abutting* property owner, without any direction or order by the officers of such city, the fact of such construction by the property owner without authority would not

relieve the city from liability for damage to persons injured thereon without fault, if after the construction of such walk the city assumed jurisdiction over it, and ordered repairs to be made prior to the accident. Nor would the city be released from liability, even though it did not assume such jurisdiction, *if the walk was in a public street in constant use*, and in the line of other sidewalks, constructed by direction of the city, or over which it had control." (Syllabus). (Italics ours).

Where the charter of a city gives it control over sidewalks in the public streets, when a sidewalk is once laid, no matter by whom,—whether by a land owner or the city,—it becomes *the duty of the city* to see that it is kept in proper repair and in a *safe condition* for travel. *Fuller v. Jackson*, 82 Mich. 480, 46 N. W. 721; *Champaign v. McInnis*, 26 Ill. App. 338; *McKnight v. Seattle*, 39 Wash. 516, 81 Pac. 998.

THE LEADING CASE.

The leading case on this subject is *Rochester v. Campbell*, 123 N. Y. 405, 20 Am. St. Rep. 760, 25 N. E. 937.

An action was brought by the city to recover from an abutting owner the amount which it had been compelled to pay to one injured by a defective sidewalk in front of the abutting owner's premises. The Court held that the abutting owner was not responsible for such injuries, either to the municipality or the injured party, although by the terms of the city charter the duty was imposed upon lot owners to keep the sidewalks in front of their

lots in good repair, and the superintendent of streets was empowered to repair defects at the lot owner's expense, in case the latter neglected to do so. The Court said:

> "We think the lot owners are liable to the municipality upon a neglect to repair the streets, after notice, for the expense which the corporation has incurred in making such repair; but this, we think, is the *extent of their liability* under the statute. It cannot be supposed that the legislature intended to impose an absolute duty to repair upon an individual who could not exercise it except under control of another. That the primary duty rests upon the municipality, notwithstanding a duty has also been imposed upon property owners, has been decided in this Court (Russell v. Canostata (1885) 98 N. W. 496) and it is inconsistent with this duty and the control which the municipality has of the streets to suppose that it was intended to impose a primary duty, also, upon the property owners. The two obligations are inconsistent with each other, and can lead only to confusion and delay in the performance of a public service. *The existence of an absolute power of control in one party, and an imperative obligation to repair in another, is impossible.* The obligation to repair is necessarily subservient to the other, and must be performed or neglected at the will and pleasure of the party having the right of control. *There is no divided duty here.* The obligation to keep the streets and highways in repair rested on the towns. They could always perform this duty through the agency of others, and for the purpose of enabling them to do so they could, in specific cases, impose its performance on the lot owners, or *compel them to pay the expenses the town was subjected to, in case it performed the duty;* but *the paramount obligation always rested upon the corporation.*" (Italics ours).

We respectfully submit that the judgment in this case is in conflict with the jurisprudence of the State of Louisiana; that a writ of certiorari should be granted and the judgment of the Circuit Court of Appeals should be reversed; and we pray accordingly.

Respectfully submitted,

JUSTIN C. DASPIT,
Member of the Bar of the Supreme Court of the United States,
Louisiana National Bank Building,
Baton Rouge, Louisiana,
Counsel for Petitioner.

Of Counsel:

J. ELTON HUCKABAY,
SARGENT PITCHER, JR.,
H. ALVA BRUMFIELD, JR.,
A. LEON HEBERT, JR.,
Louisiana National Bank Building,
Baton Rouge, Louisiana.

APPENDIX.

The Charter of the City of Baton Rouge is Act 169 of 1898, as amended. The pertinent section is Section 20. Section 20 was amended by Act 224 of 1938, page 526. The pertinent parts of Section 20 of said act are as follows:

> "The Council shall have the power to enact all laws and ordinances necessary * * * to open, establish, alter, close and vacate streets or portions thereof; to pave, grade, and otherwise improve streets and sidewalks and to alter or change the grade, or to fix new grades, of sidewalks from time to time and to order their repair or replacement or the building of new sidewalks when necessary, or when the grade or level or the paving of a street renders the grade of the existing sidewalk unsuitable, all of same to be at the cost and expense of the abutting property owner; to open new streets, or continue or broaden old ones, expropriating land for this purpose, in accordance with the general laws of the State; to keep streets and crossings, bridges, canals and ditches clean and in repair, and compel owners of property or tenants, to keep their sidewalks and neutral ground between the property line and the street curb line clean and in repair; * * * to prescribe the duties of a building inspector and fix his compensation and to provide regulations for the construction, maintenance and repair of buildings and the issuance of permits for all work of erecting, maintaining or repairing structures; * * * to levy taxes, licenses and assessments; to exercise general police powers, including the issuance of permits to control, supervise, and regulate under such general police powers and fix reasonable fees and charges therefor to cover all costs and expenses of such control, supervision and regulations, and to punish by fine or imprisonment, or both, all persons transgressing its ordinances, * * *."

JUN 10 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1063 114

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,
Petitioner and Appellant below,

versus

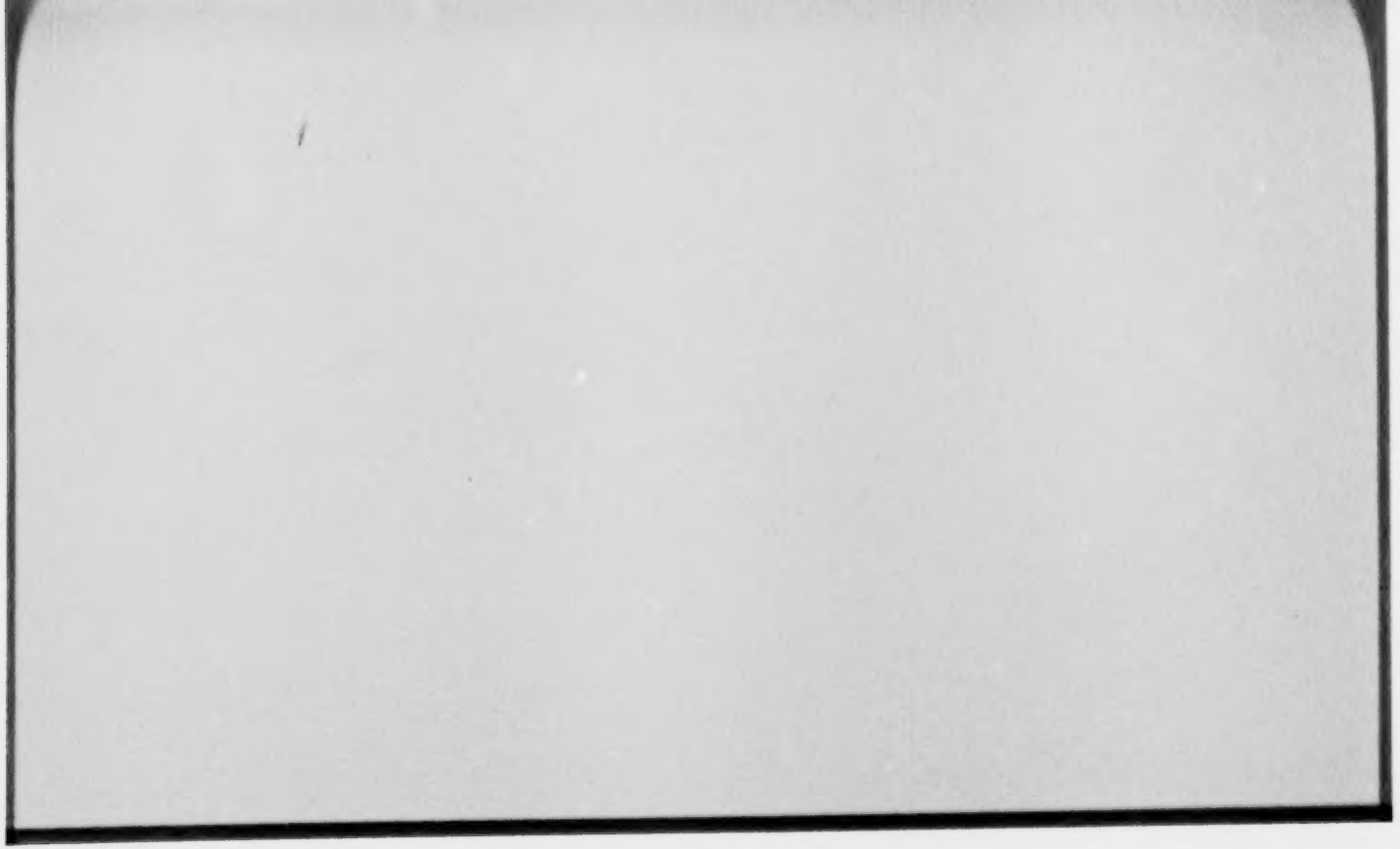
MRS. EUGENE ADLER
Respondent and Appellee below.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT—APPELLEE BELOW MRS. EUGENE ADLER

FRED G. BENTON,
Member of the Bar of the Supreme Court of the United States,
Louisiana National Bank Building,
Baton Rouge, Louisiana,
Counsel for Respondent, Mrs. Eugene Adler.

Of Counsel:
BERT E. DURRETT,
CALVIN E. HARDIN, JR.,
Louisiana National Bank Building,
Baton Rouge, Louisiana.



INDEX

	Page
I. Statement of the Case	1
II. The Issue	2
III. Argument	3
IV. Conclusion	8

INDEX

TABLE OF CASES

Page

American Mutual Liability Insurance Company vs. Adler, (C. C. A. 5th), 141 F. (2d) 489 2

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MRS. EUGENE ADLER

STATEMENT OF THE CASE

On Page 2 of the petition of American Mutual Liability Insurance Company it is stated that "the place where Mrs.

Eugene Adler, the plaintiff, slipped and fell, was on the terrazzo pavement or sidewalk in front of the Hart Theatre." The jury did not so find. We quote special interrogatory No. 3 and the answer thereto given by the jury, appearing on Page 14 of the Record:

> **"3. Do you believe and find that the plaintiff slipped and began her fall while she was on the premises occupied by the Hart Theatre? Yes."**
> (Emphasis supplied)

Petitioner did not include in its statement of the case the fact that there was substantial evidence to the effect that terrazzo was not reasonably safe for use as a walkway when wet, and that it was raining and wet when Mrs. Adler slipped and fell with such force as to fracture her femur.

THE ISSUE

On Pages 3 and 4 of its petition, petitioner sets out its conception of the questions presented. We do not believe, and evidently the Fifth Circuit Court of Appeals did not believe, that either of those questions was presented in this case.

We agree with the statement of the Fifth Circuit Court of Appeals (*American Mutual Liability Insurance Company vs. Adler, C. C. A. 5th,* March 28, 1944, 141 F. 2nd 489, at Page 490, (Advance Sheets for Federal Reporter, Second Series, May 15, 1944) that "the only question presented is whether there was substantial evidence to support the finding of the jury that

the negligence of the theatre was the proximate cause of the fall."

ARGUMENT

It is rather difficult to determine exactly what petitioner relies upon in its attempt to convince Your Honors that you should grant a writ in this case, for apparently in its petition petitioner contends that the accident occurred entirely on a public sidewalk and that no action against the abutting property owner can be maintained, and in its brief (Pages 12 and 13, under the heading "Specification of Errors") petitioner mentions a number of questions of fact respecting which petitioner apparently disagrees with the jury and with the Fifth Circuit Court of Appeals.

In page 26 of petition and brief, petitioner sets out as "THE LAW POINT" this: "Can the defendant be held liable for an injury sustained on the sidewalk?"

We submit that no question of law whatsoever was or is presented in this case for the injury did not occur on the sidewalk. Pure and simple questions of fact only were involved, those questions were presented to the jury, and the jury resolved every one of them against the defendant.

There was dispute at the time of the trial, and some conflict in the evidence, as to the place where this 75 year old lady slipped and began her fall. Plaintiff took the position, and still contends, that since the terrazzo, which had been laid by the contractors who built the Hart Theatre in the place of concrete sidewalk which had formerly existed, was dangerously slippery, and since the terrazzo in the foyer or entrance of the Hart Theatre was also dangerously slippery, it made no difference where Mrs. Adler slipped and began her fall. We

contended and still contend that this defendant's assureds were responsible for the construction of all of that terrazzo, and that all the cases relied upon by petitioner respecting the liability of an abutting property owner have no possible application for the reason that in none of those cases had the defective condition of the sidewalk been actually caused by the abutting owner. The cases relied upon by defendant-petitioner on that point, as well as cases cited by us to show that the authorities relied on by defendant-petitioner have no application here, are all discussed in the brief filed by us in the Fifth Circuit Court of Appeals, Pages 15 to 21.

But in order to protect defendant as fully as possible, so that any conceivable question of law, if it did exist, might be presented as a pure legal question to the Court, the District Judge propounded special interrogatories to the jury, one of which required the jury to find as a fact whether or not the plaintiff slipped and began her fall while she was on the premises occupied by the Hart Theatre. Interrogatory No. 3 and its answer (R., 14) were as follows:

> **"3. Do you believe and find that the plaintiff slipped and began her fall while she was on the premises occupied by the Hart Theatre? Yes."**
> (Emphasis supplied)

In view of this square and specific finding of fact of the jury we fail to see how there could be any possible error in the statement of the Fifth Circuit Court of Appeals to the effect that the only question presented was whether there was substantial evidence to support the finding of the jury that the negligence of the theatre was the proximate cause of the fall. That is purely and simply a question of fact with which we feel sure Your Honors will not concern yourselves.

Petitioner on Pages 20 and 21 of its petition and brief apparently concedes that there was conflict in the evidence as to whether plaintiff slipped and began her fall on the premises of the Hart Theatre or not, for petitioner seeks to discredit the testimony of an eye witness who had no possible interest in this case, and who testified that the fall began on the Hart Theatre premises. The only way petitioner could discredit that witness's testimony was by some involved mathematical computation based upon certain alleged isolated bits of testimony which we shall not endeavor to follow.

Since the jury found squarely and positively, on substantial evidence, that this elderly lady slipped and began to fall while on the premises occupied by the Hart Theatre, it is plain that there are no such questions presented as petitioner has set out on Pages 3 and 4 of its petition.

There is no so-called "law point."

We now call attention to some of the statements of fact made in petitioner's petition and brief with which we do not agree. The statement in Page 2 of the petition has already been referred to. The same statement, that is, that "the place where Mrs. Eugene Adler, the plaintiff, slipped and fell, was on the terrazzo pavement or sidewalk in front of the Hart Theatre" is repeated on Page 10, and is apparently repeated by implication on pages 16 and 17, of the petition and brief, and is squarely refuted by the jury's answer to special interrogatory No. 3 (R., 14).

On Page 12 and on Pages 14 and 15, and on Page 17, and on Page 31 of the petition and brief, it is stated that no person had fallen on the terrazzo either on or off the premises prior to August 31, 1941. Mr. Robert H. Hines, Manager of the

theatre, testified on two occasions to the contrary. We quote from Page 81 of the Record:

> "Q. Now, Mr. Hines, do you know of your own personal knowledge, from the time that the theatre opened up to the date that Mrs. Adler fell, whether or not any other persons had fallen in the theatre, towards the front, or on the sidewalk?
>
> A. YES, SIR, OTHER PEOPLE HAD FALLEN. How many I don't know." (Emphasis supplied.)

It is true that later Mr. Hines changed his testimony on that point, but again on Page 87 of the Record he admitted that he had given testimony under discovery on October 22, 1942, at which time his memory was better than it was when he was on the witness stand, and that in that discovery testimony he had testified:

> "Q. Do you know whether you made any such report before making this report on Mrs. Adler?
>
> A. I believe so, but I do not know positively."

The reports referred to were reports made to the defendant-insurer respecting falls on the terrazzo.

It is further stated on Page 12 of the petition and brief and again on Page 15, and again on Page 31, that the record does not conclusively establish that any person had ever fallen in the foyer of the Hart Theatre up to the date of trial on April 15, 1943. The record conclusively established, to the satisfaction of the jury, that Mrs. Adler fell there. Further, Mrs. Stella Bonnecaze testified positively that she slipped and fell and cut her eye about a month after Mrs. Adler fell, and she said (R., 146) it happened "just before you get to the side-

walk"; and on Pages 146 and 147 of the record that "I was on the Hart property I know. I hit myself against the wall", and further on Page 147 of the record "but I slipped on the floor of the Hart Theatre." Petitioner attempts to reason that because Mrs. Bonnecaze also stated that she was on Convention Street, that she could not have been on the Hart property despite the fact that she testified three times that she was on the Hart property. The Hart property was of course fronting on Convention Street and it is plain that when she said she was on Convention Street, she meant that the Hart property itself fronted on Convention Street and that she was on the Hart property.

On Page 17 of petition and brief defendant-petitioner asserts that the terrazzo contains approximately 20% of abrasive aggregate. The expert witness who exhibited a full and complete knowledge of terrazzo and its composition, and who was the only expert witness that ever examined this terrazzo when it was wet, testified positively and at several places in the record (R., 57 and elsewhere) that the terrazzo contained no abrasive aggregate whatsoever.

On Page 22 of the petition and brief, petitioner has quoted only a part of Mrs. Adler's testimony. Petitioner did not quote her testimony on Page 41 of the Record as follows:

> "Q. You are very definite and very sure that you were outside of the theatre on the sidewalk when you slipped and fell?
>
> A. **No, sir. I am not definitely sure that I was on the sidewalk."** (Emphasis supplied.)

It is hardly to be expected that this 75 year old lady, lying in the rain with a broken leg, would know exactly where she began to slip and fall with mathematical certainty. She

could hardly be expected to engage in the mathematical computation relied upon by petitioner on Pages 20 and 21 of its petition and brief.

Mrs. Elizabeth Gerding, an employee of the Theatre, whose testimony is relied upon by petitioner on Page 22 of petition and brief as definitely placing the plaintiff when she slipped and fell, admittedly did NOT see Mrs. Adler fall (R., 117). Miss Jessie Carmena did see Mrs. Adler fall, and the jury believed her testimony as it had a perfect right to do.

For some unexplained reason, petitioner quotes from paragraph 3 of plaintiff's complaint (petition and brief, Page 23) without stating that this quoted Paragraph 3 was amended as shown by Page 15 of the record. Paragraph 3 as amended is different from the original paragraph which is quoted by petitioner. Petitioner objected to the amendment, the objection was overruled, petitioner complained of that ruling in the Appellate Court, the Appellate Court said the complaint was without merit, and judging from petitioner's petition and brief filed in this Court, petitioner no longer complains of that ruling.

Since on the facts as found by the jury and approved by the Appellate Court, the plaintiff "slipped and began her fall while she was on the premises occupied by the Hart Theatre," none of the cases cited by petitioner respecting the liability of an abutting property owner for an accident occurring on a sidewalk has any possible application, and we shall not burden Your Honors with a discussion of them.

CONCLUSION

The so-called "law point" mentioned on Page 26 of petition and brief, and the questions outlined on Pages 3 and 4

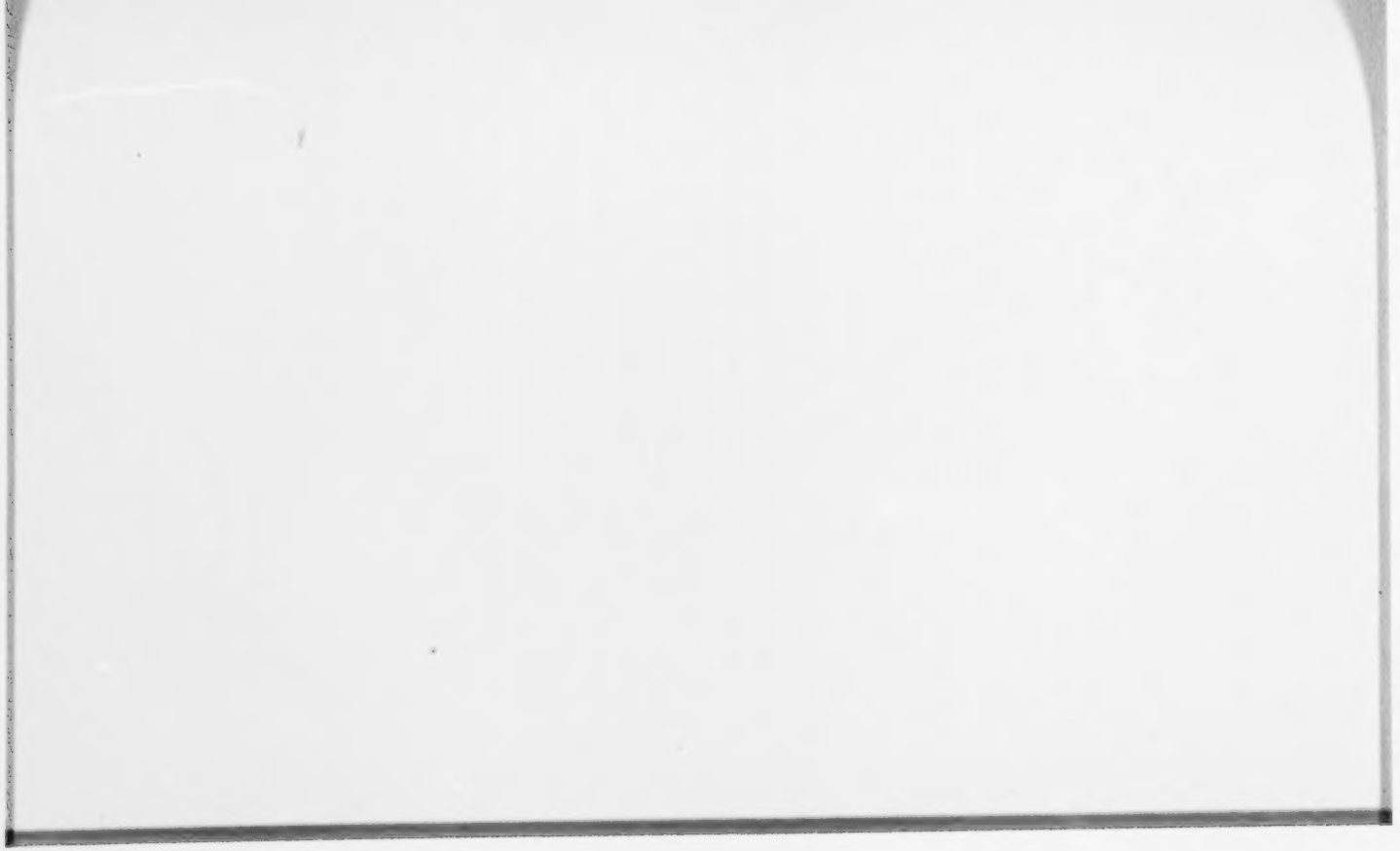
of the petition, are not presented to Your Honors at all in this case for the obvious reason that the jury found as a fact, on substantial evidence, that the plaintiff slipped and began her fall while she was on the premises occupied by the Hart Theatre (R., 14). Therefore, all of the argument of petitioner respecting the liability of an abutting property owner for damages because of an injury that may occur on an adjacent sidewalk, is irrelevant. As stated by the Fifth Circuit Court of Appeals, the only question presented is whether there was substantial evidence to support the finding of the jury that the negligence of the theatre was the proximate cause of the fall, and there was an abundance of such substantial evidence. It is well settled that certiorari should not be granted to review only a question of fact, where the finding of the jury was supported by substantial evidence.

For these reasons and for the reasons stated in the original brief filed in the United States Circuit Court of Appeals for the Fifth Circuit, the defendant's petition for certiorari should be denied.

Respectfully submitted,

FRED G. BENTON,
Member of the Bar of the Supreme
Court of the United States,
Louisiana National Bank Building,
Baton Rouge, Louisiana,
Counsel for Respondent, Mrs.
Eugene Adler.

Of Counsel:
BERT E. DURRETT,
CALVIN E. HARDIN, JR.,
Louisiana National Bank Building,
Baton Rouge, Louisiana.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1063

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,
Petitioner and Appellant Below,

versus

MRS. EUGENE ADLER,
Respondent and Appellee Below.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JUSTIN C. DASPIT,
Member of the Bar of the Supreme Court of the United States,
Louisiana National Bank Building,
Baton Rouge, Louisiana,
Counsel for Petitioner.

Of Counsel:
J. ELTON HUCKABAY,
SARGENT PITCHER, JR.,
H. ALVA BRUMFIELD, JR.,
A. LEON HEBERT, JR.,
Louisiana National Bank Building,
Baton Rouge, Louisiana.

SUBJECT INDEX.

Page

Another Case 4

CASES AND AUTHORITIES CITED.

Barnes v. District of Columbia, 91 U. S. 540 2

District of Columbia v. Woodbury, 136 U. S. 450 .. 4

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May It Please the Court:

The legal proposition presented by the case at bar appears to have been passed upon by this Honorable Court in at least two cases. We, therefore, respectfully request the indulgence of the Court in order that the attention of Your Honors may be called to the two cases, and that we may show their application to the case at bar.

We have shown in our original brief that the Hart Theatre and the terrazzo sidewalk in front of it were constructed according to *permit of the municipal authorities*,

and the sidewalk was *approved* by the City Engineer of the City of Baton Rouge. (R. 120-121). That the terrazzo sidewalk in front of the Hart Theatre is the same grade and level and conforms to the cement sidewalk on each side of it. (R. 27). That the said terrazzo sidewalk has been used by the public as a sidewalk without change, since its approval by the City Engineer on June 21, 1941. (R. 133).

In *Barnes v. District of Columbia, 91 U. S. 540,* it was held that a municipal corporation is liable for injury to an individual, arising from negligence in the construction of a work authorized by it, and for an injury arising from a defective condition of its streets, although the fee of the streets is not in the municipal corporation.

This was an action to recover damages for a personal injury received by the plaintiff in consequence of the defective condition of one of the streets of the City of Washington. The accident occurred on K Street east, and arose from the construction of the Baltimore and Potomac Railroad through that street. The road was built by *permission of the municipal corporation* and authority was given to the company to change the grade of the streets according to a plan filed. In making this change, a deep pit or excavation was made, into which plaintiff fell, sustaining serious personal injury.

In the *Barnes* case, *supra,* the defective condition of the street was not created by the municipal corporation but by the Baltimore and Potomac Railroad. Why, then, was the municipal corporation (the District of Columbia)

sued and held liable? For the reason that the excavation was made by *permission* of the municipal corporation, and a municipal corporation is liable for injury to an individual, arising from negligence in the construction of a work authorized by it, and for an injury arising from a defective condition of its streets.

Conceding *arguendo* (which we do not concede) that there is liability to plaintiff in the instant case, then the liability rests upon the municipal corporation—and not upon the defendant—since the terrazzo sidewalk where the injury occurred was constructed by *permission* of the municipal corporation and the same was *approved* by the City Engineer of the City of Baton Rouge. (R. 120, 121).

Mr. Justice Hunt, speaking for the Court in the *Barnes* case, said:

> "The authorities establishing the contrary doctrine that a city is responsible for its mere negligence, are so numerous and so well considered, that the law must be deemed to be settled in accordance with them."

The Court then cited numerous adjudications in the United States and in England. Would the Court be justified in departing from established legal landmarks to meet the hardships and supposed equities of a particular case?

Mr. Justice Field dissented because he did not think the District of Columbia should be held responsible for the

neglect and omissions of officers whom it has no power to select or control.

Thereafter, by Act of Congress, the situation which caused Mr. Justice Field to dissent in the *Barnes* case was changed, and the District of Columbia was declared a municipal corporation, and vesting its government as such in three commissioners. Act of Congress June 11, 1878, (20 St. U. S., p. 102, c. 180).

ANOTHER CASE.

The case of *District of Columbia v. Woodbury, 136 U. S. 450*, is also authority for the principle for which we are contending.

The defendant in error, Dr. Woodbury, while passing on the sidewalk near the north entrance of the Riggs House on G Street, in the City of Washington, fell into a hole, whereby he sustained personal injuries of a serious character. Claiming that the sidewalk was not in a safe condition for use by the public, and that the District authorities had been grossly negligent in not keeping it in proper repair, he brought this action to recover damages for such injuries.

The first question considered by the Court was whether the District of Columbia is, under any circumstances, liable in damages for personal injuries resulting from the unsafe condition of the avenues, streets, and sidewalks in the City of Washington.

Here, again, we observe that the municipal corporation, and not the abutting property owner or his tenant, was sued and held liable. The *Barnes* case, *supra*, was thoroughly analyzed and affirmed.

In the course of the opinion, Mr. Justice Harlan, as the organ of the Court, said:

> "(3) People must build houses, and, in order to do that, it is necessary to excavate for cellars and areas, if needed, and to dig trenches to connect with the water-mains, gas-pipes, and sewers. Nobody has a right to do this without a permit from the authorities, and, if any person undertakes to do it without a permit, he would be responsible for any injury resulting; but the District would not be, unless it had the notice already spoken of. If a permit is granted, as is usually the case, the fact is notice to the authorities that the work is in progress, and then they are charged with the duty of seeing that it is properly conducted.
>
> "(4) These works are necessarily dangerous to life and limb, and it is the duty of a person doing the work to protect it against accident to travelers on the street; and the duty of a private person is very much the same as that of the district itself, when it is prosecuting an improvement. If a private individual fails to protect the excavation or hole, or whatever it may be, it is the duty of the district authorities to see that it is protected, and they are held responsible that he shall do it; for they were notified that he was going on with the work when he obtained his permit."

For the reasons herein set forth, in addition to the authorities cited in the original brief, we respectfully submit that a writ of certiorari should be granted and the

judgment of the Circuit Court of Appeals should be reversed; and we pray accordingly.

Respectfully submitted,

JUSTIN C. DASPIT,
Member of the Bar of the Supreme Court of the United States,
Louisiana National Bank Building,
Baton Rouge, Louisiana,
Counsel for Petitioner.

Of Counsel:
J. ELTON HUCKABAY,
SARGENT PITCHER, JR.,
H. ALVA BRUMFIELD, JR.,
A. LEON HEBERT, JR.,
Louisiana National Bank Building,
Baton Rouge, Louisiana.